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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALBERT DWAYNE KYLE, Defendant and Appellant.	B265880 (Los Angeles County Super. Ct. No. TA135659)

APPEAL from the judgment of the Superior Court of Los Angeles County, Patrick Connolly, Judge. Affirmed in part and vacated in part and remanded.

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Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven Matthews, and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Albert Kyle appeals from the judgment entered on his convictions of multiple counts of criminal threats and assault with a semiautomatic firearm. Appellant asserts that insufficient evidence supports his convictions and that the court erroneously failed to instruct the jury on the lesser included offense of simple assault and the lesser related offenses of battery and brandishing a firearm. He further claims that the court erred by imposing a Penal Code section 186.22, subdivision (b)(1)(B) [1] five-year sentencing enhancement and that the abstract of judgment contains an error. As we shall explain, only appellant's claims concerning his sentence and the abstract of judgment have merit. Accordingly, we affirm the convictions but remand for resentencing and correction of the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Events Before the Charged Crimes*

On the late afternoon of June 19, 2013, a group of six to ten young women approached a home near 42nd Street and Avalon where Dymon Suankaew, Daronnie Thompkins, Heaven T., and Danae Thompkins lived, and Danae's sister, Latiera Irby,[2] occasionally stayed. One member of the group, Albrisha Kyle, appellant's sister, was looking for Latiera to confront her about a young man but Latiera was not at the home. An altercation occurred between the young women and Danae during which Albrisha allegedly stabbed Danae in the eye.

As the young women fled in a white SUV, Dymon called the police and an ambulance. She also called Berea, Danae's mother, and informed her that Albrisha had stabbed Danae. Berea then called her brother, Beron, and told him what had happened.

Soon thereafter Berea, Beron, Daronnie, and Latiera arrived at the home. Berea drove an SUV and was accompanied by Heaven (then age one), her niece Breon (then

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] The victims in this case are, respectively, Dymon Suankaew, Heaven T., Daronnie Thompkins, Berea Thompkins, Ashley Tate, Latiera Irby, Breon T., Deja T., Thomas Mathis, Beron Thompkins and Beron T., Jr. Because a number of the victims have the same last name, for the sake of clarity and consistency, all victims will be referred to by their first names.

age 11), her daughter Deja (then age 14), and Deja's friend Ashley (then age 15). Beron, in a two-door sedan was accompanied by his son, Beron, Jr. (then age 14). Latiera told Berea that she knew where Albrisha lived with her parents in Compton. Berea decided that she would drive to Compton, intending to speak with the parents.

Latiera climbed into Berea's SUV in the second-row seat next to the infant Heaven.[3] Dymon and Daronnie got into a four-door sedan driven by a family friend, Thomas Mathis, and Thomas followed Berea's SUV. Beron and Beron, Jr., followed Thomas, in Beron's car. The trio of vehicles drove to Lucien Street in the Willowbrook residential neighborhood of Compton—an area claimed by Poccet Hood Compton Crips street gang.

B. *The Confrontation on Lucien Street with Appellant and Eddie Piper*

When the group arrived in Compton, Latiera identified a green house on Lucien Street where she believed Albrisha lived with her parents. Several individuals, including Albrisha, were standing on the sidewalk in front of the home. Berea drove past the house and parked her SUV about half a block away. Thomas parked behind Berea's SUV. Beron parked his car across the street from Berea's SUV.[4]

The adults exited their vehicles to discuss the situation among themselves. Berea and Latiera both called 911 to report that they had found Danae's assailant.[5]

While Berea was on the phone with the 911 dispatcher, a black SUV, driven by Eddie Piper drove up and stopped in front of the green house. Appellant sat in the front seat of the SUV and a female sat in the backseat.[6] Albrisha and the others standing in front of the house approached the SUV and spoke with appellant and Piper.

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[3] Ashley sat in the front passenger seat, and Deja and Breon sat in the third row seat of the SUV.

[4] The street was very narrow; two cars could not pass each other on the street at the same time.

[5] The audio recording of both 911 calls were played for the jury during the trial.

[6] Appellant and Piper were active members of the Poccet Hood Crips.

Berea and the others in her group began to get back into their vehicles as Piper's SUV traveled toward them "at a high rate of speed" and stopped in the middle of the street near Beron's car. Piper exited the SUV, his arm extended, pointing a black handgun towards Beron. According to Beron's preliminary hearing testimony read at trial, appellant got out of the SUV carrying a handgun at the same time as Piper exited the vehicle.[7]

Beron and Piper exchanged words, and according to Berea, Piper got within a few feet of Beron with his gun. Fearful that Piper would shoot her brother, Berea diverted Piper's attention toward her car. Berea sought to de-escalate the situation, telling Piper, "We've got babies in the car. We've got kids in here. We're women."

Piper then approached Berea's SUV while pointing the handgun at her car. Latiera, however, told the police that both Piper and appellant approached Berea's SUV, each carrying a handgun and that appellant walked to the passenger side of the SUV and began pointing the gun at the vehicle and the people inside.[8] Berea told Piper, "Don't point that gun in my vehicle, because my granddaughter is in this car, and she's a baby; there's kids in the car." Piper replied, "I don't give a fuck. You don't have no business being over here. This is my mother fucking hood. I'll shoot this whole car up." Berea told Piper to calm down, that she wanted to find out who stabbed her daughter, and that they were not gang members. Piper pointed the gun at Berea, holding it within inches of her face, and said, "Get the fuck out of here. What the fuck you mother fuckers doing

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[7] At trial, Beron admitted that he was afraid to testify, responding "I don't recall" to most questions on direct examination about the events surrounding the crimes. He also claimed that he did not remember his preliminary hearing testimony.

[8] Latiera's statements to police were admitted at trial. At trial, however, she testified that she could not recall making her statement to the police. Although she admitted that she saw appellant with Piper, she testified that she could not see what appellant held in his hand. She also testified that she had been threatened, and was concerned for her safety; Latiera asked for assistance to be moved and was given a new, anonymous address.

over here?" and "You will get murked."[9] Piper put the gun inside Berea's SUV through the open driver's window. And as he looked to see who was inside, he pointed the gun at the occupants of the vehicle. Berea told everyone in the car to get down and to take cover.

Thomas then diverted Piper's attention away from Berea, and Piper approached Thomas's car while pointing the gun. Thomas, who sat in the driver's seat of his car,[10] and Piper began to argue. Piper reached through the window, grabbed Thomas's shirt, and pressed the gun against his shoulder. Thomas grabbed Piper's wrist holding the gun. As the gun waved around during the struggle, Piper pointed it in Daronnie's direction and at the back seat towards Dymon. Dymon testified that she feared Piper would shoot her, Daronnie and Thomas. According to Dymon, Piper moved his finger, which was close to the trigger, as if he was pulling the trigger.

Dymon also testified that during the confrontation between Piper and Thomas, appellant stood on the passenger side between Berea and Thomas's vehicles. According to Dymon, appellant held his gun at his side, alert and observing the situation; it appeared as if appellant was standing guard between the cars, "trying to have [Piper's] back."

After someone said that the police were coming, Piper and appellant got back in Piper's SUV, and Piper reversed his vehicle. Piper stopped his SUV briefly in front of the green house. Albrisha and other people came out and spoke to them before Piper drove off. The police stopped Piper's vehicle a few blocks away but found no guns. Dymon, however, testified that she saw Albrisha holding one of the guns after Piper briefly stopped his SUV in front of the green house before he fled. In addition, Piper had posted photos on Instagram which showed him with guns that appeared to be the ones used during the confrontation.

The information charged appellant and Piper with six counts of criminal threats (§ 422, subd. (a)) against Berea and the occupants of her SUV (counts 1-6); 10 counts of

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[9] "Murked" is a slang term for murder.

[10] Daronnie sat in the front seat next to Thomas and Dymon sat in the backseat.

assault with a semiautomatic firearm (§ 245, subd. (b)) against all victims (counts 9-18); and attempted murder (§§ 664, 187, subd. (a)) against Thomas (count 19).[11] The information further alleged that both appellant and Piper personally used a firearm within the meaning of section 12022.5, subdivision (a), and that the offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivisions (b)(1)(B) and (b)(1)(C). Appellant and Kyle pleaded not guilty and denied the special allegations.

At trial, Piper testified that he, appellant, and a female had gone to the green house on Lucien Street to pick up money from Albrisha and that when they arrived, Albrisha told them that the group parked down the street—Berea and her family—had come to start a fight. Piper stated that he drove next to Beron's vehicle, and exited his vehicle to speak to Beron. Beron told him that they were trying to find out what happened to their relative, and Berea said that they were waiting for the police. According to Piper, he told them that they were scaring his family, and he asked them to wait for the police around the corner. Piper testified that he and Thomas exchanged words and that he shoved Thomas in the shoulder. Piper then fled after he saw Beron retrieve a gun from the trunk of his car. According to Piper, neither he nor appellant possessed a gun that evening. Appellant did not testify.

The jury found Piper and appellant guilty of counts 1 through 5 and 8 through 18 and found the firearm and gang enhancements true as to those charges.[12] The court

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[11] Appellant and Piper were also charged in counts 7 and 8, respectively, with possession of a firearm by a felon in violation of section 29800, subdivision (a)(1), various prior prison term allegations within the meaning of section 667.5, subdivision (b), and prior serious or violent felony convictions within the meaning of section 667, subdivision (a)(1), section 667, subdivisions (b) through (j), and section 1170.12.

[12] The court dismissed count 6 pursuant to section 1118.1. The jury deadlocked on count 19 as to both appellant and Piper, and the court declared a mistrial on that count. In bifurcated proceedings, the court found the prior conviction allegations true as to both defendants.

sentenced appellant to 42 years 8 months in prison and imposed various fines and assessments.

Appellant and Piper[13] appealed.

DISCUSSION

I. *Sufficient Evidence Supports Appellant's Convictions.*

Appellant argues that there was insufficient evidence to support his convictions for assault with a semiautomatic firearm and criminal threats.

A. *Assault with a Semiautomatic Firearm*

Appellant claims that insufficient evidence supports his convictions for assault with a semiautomatic weapon against Beron, Dymon, Daronnie, and Berea and the five occupants of Berea's SUV.[14] He asserts that the evidence did not show that Piper pointed the firearm at any of these individuals. In addition, he claims that there was no evidence that Piper was aware that Dymon and Daronnie were passengers in Thomas's car or that Piper was aware of the presence of occupants in Berea's SUV. We disagree.

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Section 245, subdivision (b), makes it a crime to commit an assault with a semiautomatic firearm. Assault is a general intent crime that does not require a specific intent to injure the victim or a subjective awareness of the risk that an injury might occur. (*People v. Williams* (2001) 26 Cal.4th 779, 788-790.) A defendant commits assault with a firearm when he or she points the firearm at, towards or between persons with the weapon in a position to be used instantly. (See, e.g., *People v. Raviart* (2001) 93 Cal.App.4th 258, 262-264.)

The testimony of a single witness is sufficient to support a conviction unless the testimony describes facts or events that are physically impossible or inherently

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[13] During the pendency of this appeal, Piper's counsel informed this court that Piper had passed away in May 2016. Consequently, we remanded Piper's appeal to the trial court, directing it to enter an order abating the appeal.

[14] Appellant does not challenge the sufficiency of the evidence supporting the assault conviction with respect to Thomas.

improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Here, credible testimony from several witnesses support that Piper was aware of the victims' presence and that he pointed the weapon directly at or towards them. Berea testified that Piper pointed his gun towards Beron and his vehicle as we walked towards Beron, and that she diverted Piper's attention because she was afraid Piper would shoot her brother. According to Dymon, Piper then walked towards Berea's SUV, pointed his gun "aggressively" at Berea, and threatened to shoot Berea and her "whole car." And as he "scanned" into her SUV, he placed his gun inside of the vehicle pointing and waving the gun across the interior at the occupants who were screaming and trying to take cover. Further, Berea's testimony that she told Piper that the car contained women and children supports the jury's conclusion that he was aware of the occupants of the car. The jury could also reasonably infer that Piper was aware of the passengers in Thomas's four-door sedan—Daronnie and Dymon. Thomas's window was rolled down, and according to Dymon, as Piper struggled with Thomas over the gun, Piper pointed it at Thomas and then inside the sedan in the direction of Daronnie and towards the backseat where Dymon sat. Accordingly, there was sufficient evidence to support a rational trier of fact finding that Piper committed assault with a semiautomatic firearm on all of the victims. (*People v. Raviart*, supra, 93 Cal.App.4th at pp. 262-266.)

B. *Criminal Threats*

Under section 422, the prosecution was required to prove that Piper intentionally made a criminal threat that caused Berea and her passengers[15] " 'to be in sustained fear' " for their safety and that their fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Ca1.4th 221, 227-228.) Sustained fear means fear for "a period of time 'that extends beyond what is momentary, fleeting, or transitory.' " (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.)

[15] The criminal threats charges were based on the statements Piper made to Berea; only Berea and the five occupants of her SUV were the alleged victims of the criminal threats.

Appellant argues that the victims' fear was fleeting and momentary rather than sustained;[16] he maintains that only approximately four minutes[17] passed between Piper's threats to "murk" Berea and "shoot up" her SUV and when the police stopped his vehicle several blocks away. Appellant's analysis does not focus on the correct time period. The appropriate time period to determine whether the victims were in sustained fear is the period of time between Piper's threat and when the victims learned that the police had detained Piper and appellant. (See *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 [victim sustained fear during time between the threat and when victim learned her assailant was no longer armed, mobile and at large].) Given all that transpired, including the police stopping Piper's vehicle, questioning Piper and appellant, and searching the car, a jury could reasonably infer that more than four minutes elapsed between the crime and when the police informed the victims the suspects had been detained, and that during that time, the victims' experienced fear. Based on the circumstances, the jury could reasonably conclude that the victims' sustained fear constituted "a period of time that extends beyond what is momentary, fleeting, or transitory." (See *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 [holding that even though the threat occurred during a minute and the victim departed immediately, the court held that defendant's "actions created a sustained fear, a state of mind that was certainly more than momentary, fleeting, or transitory"].) Consequently, we do not find appellant's argument persuasive.

C. *Aider-Abettor Liability*

Appellant contends that there was insufficient evidence that he aided or abetted the assaults and criminal threats; he claims that he was a mere bystander to the assaults and that there was no evidence that he heard the criminal threats. We disagree.

Resolving all conflicts in the evidence and drawing all reasonable inferences in favor of the judgment below, substantial evidence supports the conclusion appellant aided

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[16] Appellant does not argue that the victims did not (or could not) experience actual fear as a result of the threats; instead, his appeal centers solely on the claim that the amount of time they experienced fear was insufficient as a matter of law.

[17] Appellant's time estimate is based on the duration of the 911 calls.

and abetted Piper in the assault and the criminal threats. Whether a defendant's conduct constitutes aiding and abetting is determined by evaluating whether the person directly or indirectly aided the perpetrator by acts or encouraged him or her by words or gestures. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 411.) Although presence at the scene of the crime is alone not enough to establish aider and abettor status, it is a factor that may be considered, along with companionship with the perpetrator and conduct before and after the crime. (*Id.* at p. 409.) Here appellant did not independently happen by the scene of the crime. Appellant and Piper's concerted action implied a common purpose: appellant accompanied his fellow gang member, Piper, to confront a group of people who, according to Piper, had come into their neighborhood, looking to fight appellant's sister. Piper and appellant got out of the SUV at the same time and they were both carrying guns. Latiera told the police that both Piper and appellant approached Berea's SUV, carrying handguns, and that appellant walked to the passenger side of the SUV with his gun. Dymon described appellant as "standing guard" during Piper's confrontation with Thomas. This evidence is sufficient to support the finding that appellant was aiding and abetting in the assaults.

Moreover, in view of appellant's conduct throughout the confrontation and of appellant and Piper's joint purpose to confront the individuals who they believed sought to challenge his sister to a fight, appellant is also liable as an aider and abettor to the criminal threats against Berea and her passenger. Based on the totality of the evidence, the jury could conclude that Piper's criminal threats were reasonably foreseeable consequences of the original criminal acts—assault with a firearm—that appellant encouraged and facilitated. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 [an aider and abettor may be charged with the crime originally contemplated as well as other crimes alleged to be reasonably foreseeable consequences of the original crime].) The evidence, in our view, therefore supports the jury's finding that appellant played a supportive affirmative role in the assaults and criminal threats and was not simply a passive bystander.

II. *The Trial Court Did Not Err in Refusing to Instruct the Jury on the Lesser Included Offense of Assault or the Lesser Related Offenses of Battery and Brandishing a Firearm*

During the trial, the prosecutor provided the court with instructions on assault (§ 240) and battery (§ 242) and appellant specifically requested that the court instruct the jury on the offense of brandishing a firearm (§ 417, subd. (a)(2)). The trial court ruled the evidence did not warrant the instructions on assault or battery, and because brandishing a firearm was not a lesser included offense of the assault with a semiautomatic firearm, that instruction was also not required.

Appellant contends the trial court erred and denied him due process and a fair trial by failing to instruct on these lesser offenses. We disagree.

A. *Lesser Included Offense—Assault*

Assault is a lesser included offense of assault with a semiautomatic firearm. (See *People v. Miceli* (2002) 104 Cal.App.4th 256, 272.) And therefore, the trial court had a duty to instruct on assault if the jury could have reasonably concluded that the defendant committed the lesser, uncharged offense but not the greater, charged offense. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

The evidence did not warrant an instruction on assault. The People proceeded on counts 9 through 18 (assault with a semiautomatic weapon) based on the evidence that Piper assaulted the victims with his firearm. In contrast, the defense's theory, and Piper's testimony, was that both Piper and appellant were unarmed during the encounter; and that although Piper shoved Thomas in the shoulder, neither Piper nor appellant assaulted any of the victims. Pursuant to Piper's version of events, neither he nor appellant would be guilty of any crime. Consequently, under either scenario, there was no evidence from which a jury could reasonably conclude that appellant committed a simple assault. Either they committed assault with a weapon or they committed no crime. Thus, the trial court had no duty to instruct on simple assault.

B. *Lesser Related Offenses—Battery and Brandishing a Firearm*

Appellant correctly acknowledges that battery and brandishing a firearm are lesser related offenses of assault with a semiautomatic weapon. (*People v. Steele* (2000) 83 Cal.App.4th 212, 218 [brandishing a firearm is a lesser related offense of assault with a firearm.]; see *People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 10 [battery is not a lesser included offense of assault with a firearm].) Appellant also recognizes that the California Supreme Court has held that absent agreement of the parties, defendant has no right to instructions on lesser related uncharged offenses, even if he or she requests the instruction and substantial evidence would have supported it. (*People v. Birks* (1998) 19 Cal.4th 108, 136-137, see also *People v. Jennings* (2010) 50 Cal.4th 616, 668.) Nonetheless, appellant posits that principles of federal constitutional due process require that the court instruct on the lesser related offenses suggested by the evidence. We disagree.

" ' [N]o federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions' " has been recognized in a non-capital case. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344; see also *People v. Breverman* (1998) 19 Cal.4th 142, 168 [the United States Supreme Court's "decisions leave substantial doubt that the federal Constitution confers *any* right to lesser . . . offense instructions in noncapital cases"].) Consequently, the court did not violate appellant's fair trial or due process rights when it refused to instruct on battery and brandishing of a firearm.

III. *The Trial Court Erred By Imposing The Five-Year Sentencing Enhancement of Section 186.22, Subdivision (b)(1)(B) On Count 9*

Appellant contends that the trial court erred by imposing a five-year section 186.22, subdivision (b)(1)(B) gang enhancement in addition to imposing a 10-year section 12022.5, subdivision (a) gun enhancement on his conviction of count 9.[18] He is correct. In *People v. Le* (2015) 61 Cal.4th 416, 419 (*Le*), the Supreme Court held that a trial court may not impose both a firearm enhancement under section 12022.5, former subdivision (a)(1), and a gang enhancement under section 186.22, subdivision (b)(1)(B), in connection with a single offense, when the offense is a "serious felony" under section 186.22, subdivision (b)(1)(B) because it involved the use of a firearm. (*Id.* at p. 429.) Such is appellant's case. Like the defendant in *Le,* appellant was charged with the firearm enhancement under section 12022.5, former subdivision (a)(1), and appellant's offense was charged as a "serious felony" for the purposes of the section 186.22, subdivision (b)(1)(B), because of the use of a firearm in connection with the assault. The *Le* Court concluded that where two enhancements depend on firearm use, section 1170.1, subdivision (f)[19] bars the imposition of both enhancements. (*People v. Le*, *supra*, 61 Cal.4th at 429.) Accordingly, appellant's five-year sentence imposed on count 9 under section 186.22, subdivision (b)(1)(B) must be reversed, and the matter remanded for resentencing.

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[18] The trial court sentenced appellant on count 9 (principal term) to the middle term of six years doubled to 12 years pursuant to the "Three Strikes" law, plus the firearm enhancement (§ 12022.5, subd. (a)) and the gang enhancement (§186.22, subd. (b)(1)(B)). The court also sentenced appellant on counts 10 and 11 to one-third the middle term of two years, which was doubled to four years pursuant to the Three Strikes law, plus one-third the middle term of 4 years, or 16 months, for each firearm enhancement attached to those counts; and five years for the section 667, subdivision (a), enhancement. The court stayed the sentences on counts 1 through 4, 7, and 12 through 18, and the remaining firearm and gang allegations.

[19] Section 1170.1, subdivision (f) provides, in relevant part: "When two or more enhancements may be imposed for . . . using a dangerous or deadly weapon . . . in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense."

IV. *Error in the Abstract of Judgment*

The trial court imposed, and the minute order reflects, a restitution fine (§ 1202.4, subd. (b)) of $5,000 and a suspended parole revocation fine (§ 1202.45, subd. (a)) of $5,000. The abstract of judgment, however, indicates that the court imposed restitution and parole revocation fines of $10,000 each. On remand, the trial court must ensure the abstract of judgment reflects restitution and parole revocation fines of $5,000 each. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.)

DISPOSITION

Appellant's convictions on all counts are affirmed. We vacate the sentence on count 9 and remand the matter for resentencing. On remand, the trial court is also directed to correct the abstract of judgment to reflect the imposition of separate restitution and parole revocation fines of $5,000 each.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.